FRANK COWLEY v. HALAEVALU 'AHOLELEI.

(Civil Action. Hunter J. Nuku'alofa, 5th January, 1955).

Marriage — Declaration by Supreme Court re validity of marriage — Marriage of a British subject to a Tongan — Validity of marriage — Intoxication — Marriage performed on a Sunday — Treaty of Friendship — The Constitution Clause 6 — The Supreme Court Act 1903 — The Marriage and Registration Act 1926 — The Naturalisation Act 1955.

This was an application to the Supreme Court by the plaintiff for a declaration that his marriage to the defendant was null and void on the grounds that there was no true consent to the marriage on his part as he was under the influence of liquor when the ceremony was performed; that the marriage was performed on a Sunday; and that he was coerced into the marriage. The defendant opposed the application on the following (amongst others) grounds: (1) That the Supreme Court has no power to make a declaration as sought (2) Even if the Court has such a power it has no jurisdiction to entertain this application as the plaintiff is a British subject and by the marriage the defendant also became a British subject.

The facts are sufficiently set forth in the judgment.

HELD. The Supreme Court has jurisdiction to make a declaration as to the validity of a marriage.

The marriage was valid.

Application dismissed.

Finau (with him Tu'akoi, Tupou and Latu) appeared for the plaintiff.

Pousima appeared for the defendant.

C. A. V.

HUNTER J.: In this case Plaintiff is asking the Court to make a declaration that his marriage with the Defendant is invalid and void.

The Counsel for the Defendant took a preliminary objection submitting that this Court has no jurisliction to deal with the matter as the Plaintiff is a British Subject and that by her marriage the Defendant automatically became a British Subject and in accordance with Article V. of the Treaty of Friendship 1901 the case should be dealt with in accordance with the provisions of "The Pacific Order in Council 1893."

I decided that it would be more satisfactory to hear the facts first, reserving all questions of law to be argued later.

By his summons the Plaintiff asked that the Court declare his marriage with the Defendant invalid on the following grounds :— (1) That he was so much under the influence of liquor at the time of the marriage that he could give no real consent; (2) That he was coerced by the Defendant and her relatives while he was not in his right mind; and (3) That the marriage was performed on a Sunday.

The following facts were not disputed :—

(1) The Plaintiff is and was at the time of the marriage a British Subject.

(2) The Defendant at the time of the marriage was a Tongan.
(3) That a license was duly issued in accordance with Section 9 of the Marriage and Registration Act 1926.
(4) That a marriage ceremony was duly performed.
(5) That a marriage certificate in due form dated 26th December, 1953 was issued and filed in accordance with Sections 13 and 14 of the Marriage and Registration Act 1926.
(6) That the 26th December, 1953 was a Saturday.
(7) That the parties lived together as man and wife for some months after the ceremony.

The onus of proof in this case rests on the Plaintiff. It has been said that where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed in the absence of decisive evidence to the contrary. (Piers v. Piers 1849 2.H. L. 331.) I have not had the advantage of reading the report of this case but it is cited in Halsbury's Laws of England where a brief note of the facts is given and Mr. Latey in his treatise on Divorce (1945 Edition) adopts it as the proper principle to be applied.

Of course in this Court I am not administering the English law but as I have said on other occasions I proposed, as far as I can, to follow the principles that have been laid down by the English Courts unless they are contrary to Tongan law or Tongan Custom.

After having carefully observed all the witnesses called, and considered all the evidence I have come to the following conclusions on the facts :—

(1) I am not satisfied that the Plaintiff was so much under the influence of liquor at the time of the ceremony as to render the marriage invalid. On the contrary, I am satisfied that although the Plaintiff had consumed a quantity of liquor on the day of the ceremony and on the preceding day he was, when the marriage was performed, perfectly capable of understanding and did understand the nature and purport of the proceedings and that at that time he wished to marry the Defendant.

(2) I am not satisfied that the marriage took place on a Sunday. There is no doubt that the ceremony was performed close to midnight on Saturday the 26th but the evidence does not satisfy me that it was after midnight, and therefore on Sunday. As I said above the Plaintiff carried the onus of satisfying me that this marriage was performed on a Sunday and he has failed to do so. In saying this I have not put the test as high as that laid down in Piers v. Piers, that is to say I have not looked for decisive evidence that it was performed on a Sunday. Even adopting the ordinary principles to be applied in a civil action the evidence called by the Plaintiff has not weighed down the balance in his favour.

The Court cannot guess at the time. The only witness who gave positive evidence as to the time was 'Uliti Palu, and after careful consideration I do not accept his evidence on the important points. The only other witness who was any assistance in fixing the time was Mr. MacKay and his evidence is not such as to convince me that the ceremony must have taken place on the Sunday. He said in answer to a question by me, "I fix the time (that is the time the parties were at his place) as 11.45 p.m. by my watch and by later inquiries." He admits he did not look at his watch when talking to 'Uliti, but says that he looked at his watch about two minutes later. He said he remembers mentioning to his wife how late the Tongans wished to get married. If as he says his recollection of the time is based on "later enquiries" then it is of little assistance when even minutes are of importance. Even if his watch did show the time as 11.45 there is no evidence that the watch was exactly right, an error of ten or even five minutes could have made all the difference. Assuming however that it was 11.45 p.m. when the party was at Mr. MacKay's house, and I am not satisfied of this, I am not satisfied that the vital point in the ceremony was not reached before midnight on the Saturday the 26th December. Paula Kongaika, the minister who performed the ceremony said that he does not recall the time but "if it had been performed after midnight I would have dated the certificate the 27th."

No evidence was called to support the second ground in the summons. It follows from these findings of facts that the marriage was valid and the Plaintiff and the Defendant are lawfully married.

Although in view of these findings it is not necessary for me to decide the question whether a marriage in accordance with Tongan Law is valid if performed on a Sunday, as this point was argued before me I think it desirable that I express my view on it.

The Statutory requisites for a valid marriage according to Tongan Law are laid down in the Marriage and Registration Act 1926. They are as follows :—

(1) The parties must be sane, of the prescribed age and not within the prohibited degrees (Sections 5 and 6).

(2) They must apply for and be issued with a license by the Registrar (Sections 8 and 9).

(3) The marriage must be solemnised by a minister of Religion before at least two witnesses (Sections 13 and 15).

Section 15 of the Act provides that every marriage solemnised in accordance with the above provisions "shall be a legal marriage and no other marriage shall be valid." It will be noted that nothing is laid down in the Act as to the hours within which or the days on which a marriage may be performed.

Counsel for the Plaintiff submitted, however, that Clause 6 of the Constitution renders any marriage performed on a Sunday void.

Clause 6 provides "The Sabbath Day shall be sacred in Tonga for ever and it shall not be lawful to do work or play games or trade on the Sabbath. And any agreement made or document witnessed on this day shall be counted void and shall not be recognised by the Government."

It was submitted that marriage is an agreement between two persons and therefore can not be validiiy made on a Sunday.

It is true that marriage is an agreement but I do not think that it is an agreement within the contemplation of this Clause of the Constitution. Although there is a full stop after the word "Sabbath" in the third line my view is that the clause should be read as a whole and that the words "any agreement" refer to doing work, playing games or trading on the Sabbath. The meaning of the Clause is made clear from the first few words — "The Sabbath Day shall be sacred in Tonga for ever." It could not have been meant to refer to the performance of a marriage, which as Mr. McKay said in evidence is "a solemn religious ceremony." The Clause was inserted for the same reason as the various Sunday Observances Acts were introduced in England and "any agreement" must be read as relating to the doing of work, the playing of games, or trading.

There remains the question of jurisdiction. This falls under two heads :

(1) Has this Court Jurisdiction to entertain a suit claiming a declaration as to the validity of a Tongan marriage ?

(2) Assuming it has such jurisdiction can the Court deal with the present case in view of the provisions of the Treaty of Friendship ?

Section 4 of the Supreme Court Act 1903 gives to the Supreme Court jurisdiction in divorce, probate and admiralty "and in any other matter not specifically alloted to any other tribunal." The words "and in any other matter" are very wide and I can see no reason why they should not be construed as giving to the Supreme Court (which is the Superior Court in Tonga) jurisdiction to hear any matter which may be proper for a Court of Justice to determine.

The Marriage and Registration Act 1926 vests power in the Supreme Court to declare a marriage null and void where the license has been obtained by a false oath (Section 10) and Section 16 speaks of the Supreme Court "making" a marriage invalid; not "dissolving" a marriage, which is the jurisdiction of the Divorce Court.

From these sections it appears to me that the Legislature has given to the Supreme Court jurisdiction to enquire into the validity of a marriage quite apart from the question of Divorce. If this were not so it would mean for example that an incestuous marriage could not be dealt with, as the Divorce Act 1927 contains no provisions with regard to nullity, except sub-section (v) of Section 2 which deals with incapacity.

Whether the Court has jurisdiction in this particular case depends upon Article V. of the Treaty of Friendship, which vests in the British Crown jurisdiction in "all claims of a civil nature against British Subjects or foreigners". I doubt whether the present action is a claim of a civil nature "against" a British subject or foreigner, even if by the marriage the Defendant did become a British subject or foreigner. It is not a claim by the Plaintiff against the Defendant, but an application by him for the Court's declaration as to whether the marriage is or is not valid. Although Counsel for the Defendant sought to uphold the validity of the marriage Frank Cowley and Halaevalu 'Aholelei were not plaintiff and defendant in the usually accepted sense.

Pousima submitted that by the marriage, the Defendant became a British Subject but this is not so. The British Nationality Act 1948 provides that from the 1st January, 1949 any woman who marries a British subject does not (as she did before the Act) automatically become a British subject, but she is entitled to become one on making application and taking the prescribed oath of allegiance to the British Crown. No such application or oath has been made by the defendant and therefore she did not become a British subject by her marriage. She may be an "alien" (See Section 8 of the Naturalisation Act 1915 (Tonga) but an alien by Tongan Law. She is a "Statutory" alien, not a "foreign" alien; the Tongan Act clearly recognises the distinction (See Section 15) and in my view the defendant is not a "foreigner" within the meaning of Article V.

If the marriage is valid, and I have decided that it is, the Defendant is now an "alien" and in the curious position of having no nationality, unless she adopts British Nationality which she is quite entitled to do, or applies for readmission to Tongan nationality under Section 15 of the Naturalisation Act.

It may be suggested that as the Defendant is an "alien" she comes within the provisions of Article V and therefore this Court has no jurisdiction but as I have already pointed out, although she is an alien she is not a foreigner coming within the provisions of Article V. Nor do I think this is a claim against a foreigner within the meaning of Article V. It is an application to the Tongan Court to determine the validity of a marriage performed in Tonga in accordance with Tongan law and as such this Court has jurisdiction.

I therefore refuse to make the declaration asked for by the Plaintiff.

I declare the marriage between the plaintiff and defendant valid.